

**Case C-784/23**

**Summary of the request for a preliminary ruling under Article 98(1) of the Rules of Procedure of the Court of Justice**

**Date lodged:**

19 December 2023

**Referring court:**

Riigikohus (Estonia)

**Date of the decision to refer:**

19 December 2023

**Applicants and appellants:**

OÜ Voore Mets

AS Lemeks Põlva

**Defendant and respondent:**

Keskkonnaamet (Environmental Board)

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**Subject matter of the dispute in the main proceedings**

An action brought by OÜ Voore Mets seeking compensation for damage resulting from the fact that felling operations were suspended by order of the Keskkonnaamet and an action brought by AS Lemeks Põlva seeking a declaration that the Keskkonnaamet's orders were unlawful.

**Subject matter and legal basis of the reference**

The request for a preliminary ruling under the third paragraph of Article 267 TFEU seeks an interpretation of Article 2, Article 5(a), (b) and (d) and the third indent of Article 9(1)(a) of Directive 2009/147/EC of the European Parliament and of the Council of 30 November 2009 on the conservation of wild birds (OJ 2014 L 20, p. 7).

### Questions referred for a preliminary ruling

1. Can Article 5(a), (b) and (d) of Directive 2009/147/EC of the European Parliament and of the Council of 30 November 2009 on the conservation of wild birds be interpreted as meaning that the prohibitions laid down in it apply only in so far as is necessary to maintain the population of the species concerned at a level which corresponds in particular to ecological, scientific and cultural requirements, while taking account of economic and recreational requirements, within the meaning of Article 2, provided that the killing or disturbance of birds or the destruction of, or damage to, their nests or eggs is not the aim of the action?
2. Must Article 5(a), (b) and (d) of Directive 2009/147, read in conjunction with Article 2 of that directive, be interpreted as meaning that the actions prohibited under those provisions during the breeding season of birds are deliberate, inter alia, where it can be assumed, on the basis of scientific data and observation of individual birds, that approximately ten pairs of birds per hectare are nesting in a forest which is to be completely cleared (clear-cutting) without it having been established that individuals of bird species which are in an unfavourable condition are nesting in the felling area?
3. Must Article 5(a), (b) and (d) of Directive 2009/147, read in conjunction with Article 2 of that directive, be interpreted as meaning that the actions prohibited under those provisions during the breeding season of birds are deliberate, inter alia, where it can be assumed, on the basis of scientific data and observation of individual birds, that approximately ten pairs of birds per hectare are nesting in a forest where only some of the trees are to be felled (shelterwood cutting), without there being any reason to believe that individuals of bird species which are in an unfavourable condition are nesting in the felling area?
4. Can the third indent of Article 9(1)(a) of Directive 2009/147, read in conjunction with Article 2 of that directive, be interpreted as meaning that a Member State's legislation is compatible with it which permits derogations from the prohibitions governed by Article 5(a), (b) and (d) of that directive so that clear-cutting can be carried out during the breeding and rearing season of birds in order to prevent serious damage to forest as property?
5. Can the third indent of Article 9(1)(a) of Directive 2009/147, read in conjunction with Article 2 of that directive, be interpreted as meaning that a Member State's legislation is compatible with it which permits derogations from the prohibitions governed by Article 5(a), (b) and (d) of that directive so that shelterwood cutting can be carried out during the breeding and rearing season of birds in order to prevent serious damage to forest as property?

6. If Directive 2009/147 does not permit clear-cutting during the breeding and rearing season of birds which is intended to prevent serious damage to forests as property, is such a regime compatible with Articles 16 and 17 of the Charter of Fundamental Rights of the European Union and does it apply even if the felling does not cause harm to bird species which are in an unfavourable condition?
7. If Directive 2009/147 does not permit shelterwood cutting during the breeding and rearing season of birds which is intended to prevent serious damage to forests as property, is such a regime compatible with Articles 16 and 17 of the Charter of Fundamental Rights of the European Union and does it apply even if the felling does not cause harm to bird species which are in an unfavourable condition?

#### **Provisions of international law relied on**

Convention on the Conservation of European Wildlife and Natural Habitats signed in Bern on 19 September 1979 (OJ 1982 L 38, p. 3), Article 6 and Article 9(1)

#### **Provisions of EU law relied on**

Directive 2009/147/EC of the European Parliament and of the Council of 30 November 2009 on the conservation of wild birds (OJ 2014 L 20, p. 7; ‘the Birds Directive’), Article 2, Article 5(a), (b) and (d) and the third indent of Article 9(1)(a)

Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora (OJ 1992 L 206, p. 7; ‘the Habitats Directive’), Article 12

Charter of Fundamental Rights of the European Union (‘the Charter’), Articles 16 and 17

#### **EU case-law relied on**

Judgment of 4 March 2021, *Föreningen Skydda Skogen* (C-473/19 and C-474/19, EU:C:2021:166)

Opinion of Advocate General Kokott in Joined Cases *Föreningen Skydda Skogen and Others* (C-473/19 and C-474/19, EU:C:2020:699)

Judgment of 18 May 2006, *Commission v Spain* (C-221/04, EU:C:2006:329)

Judgment of 2 March 2023, *Commission v Poland* (Forest management and good practice) (C-432/21, EU:C:2023:139)

Judgment of 26 January 2012, *Commission v Poland* (C-132/11, not published, EU:C:2012:44)

### **Provisions of national law relied on**

Loomakaitseseadus (Law on animal protection; ‘the LoKS’), Paragraph 7(1)(3)

Looduskaitseseadus (Law on nature conservation; ‘the LKS’), Paragraph 55(3)(4) and Paragraph 55(6<sup>1</sup>)

Keskkonnaseadustiku üldosa seadus (General Part of the Environmental Code; ‘the KeÜS’), Paragraphs 4, 5 and 11(1)

Korrakaitseseadus (Law on law enforcement; ‘the KorS’), Paragraph 5

### **Succinct presentation of the facts and procedure**

- 1 In the first case in the main proceedings, OÜ Voore Mets (‘Voore Mets’) carried out felling operations in spring 2021 on a plot of land belonging to it in accordance with a registered forestry declaration.
- 2 By order of 17 May 2021, the Keskkonnaamet, in accordance with Paragraph 7(1)(3) of the LoKS, ordered that the felling work on that plot of land be suspended until 21 May 2021 to protect the nesting of birds. The order states that it is scientifically proven that there is at least one pair of birds per hectare breeding in every forest, for which reason continuing the felling operation would entail a real danger of disturbing the nesting and rearing of birds and destroying or damaging nests.
- 3 By order of 21 May 2021, the Keskkonnaamet ordered that felling on the plot of land concerned be suspended until 31 July 2021. It pointed out that, during a site inspection on 21 May 2021, birds had been observed on the plot of land which were highly likely to be nesting in the area, namely wood warbler, wren, blackbird, song thrush and chaffinch. In addition, two probable broods had been found: a nuthatch nest had been discovered in a woodpecker’s hole, and the activity of a pair of bullfinches had been observed. The Keskkonnaamet stated that the plot of land concerned contained numerous hollow trees in which birds could be nesting, although they were not observed to be doing so during the site inspection. The felling operation was suspended until 31 July in order to ensure the protection of late-breeding birds.
- 4 Voore Mets brought an action before the Tallinna Halduskohus (Administrative Court, Tallinn) seeking compensation in the amount of EUR 2 403.52 for the damage resulting from the suspension of felling work on the Keskkonnaamet’s orders of 17 and 21 May 2021. It submitted that the damage consisted of the costs of transporting the forestry machinery and the loss of profit resulting from the

interruption of work. By judgment of 18 January 2022, the Tallinna Halduskohus dismissed the action. The judgment established that the order of 17 May 2021 was lawful and the order of 21 May 2021 was unlawful because of disproportionate restrictions. The court held that the applicant's alleged loss of profit could have been incurred only as a result of the order of 17 May 2021.

- 5 Voore Mets lodged an appeal seeking to have the judgment of the Halduskohus set aside and the action upheld. By judgment of 11 May 2022, the Tallinna Ringkonnakohus (Court of Appeal, Tallinn) dismissed the appeal and upheld the judgment of the Halduskohus.
- 6 In the second case in the main proceedings, AS Lemeks Põlva ('Lemeks Põlva') purchased from the owner of a plot of woodland the right to fell the forest growing there. The Keskkonnaamet confirmed the forestry declarations of 4 May 2021, authorising clear-cutting in zone 1 and shelterwood cutting in zones 2, 4, 5 and 6 on that plot of land.
- 7 By order of 21 May 2021, the Keskkonnaamet ordered that the felling of trees on the plot of land concerned be temporarily suspended until 26 May 2021 in order to protect the nesting of birds. The order states that there is at least one pair of birds per hectare breeding in every forest. It indicates that continuing the felling would entail a real danger of disturbing the breeding and rearing of birds and destroying or damaging nests.
- 8 By order of 26 May 2021, the Keskkonnaamet ordered that no timber be felled on the plot of land concerned until 15 July 2021. The order states that an observation session established the certain presence of great spotted woodpeckers and chaffinches breeding, the probable presence of great tits and jays breeding and the possible presence of chiffchaffs, wood warblers, garden warblers, wrens, dunnocks and robins breeding.
- 9 Lemeks Põlva brought actions before the Tartu Halduskohus (Administrative Court, Tartu) seeking a declaration that the Keskkonnaamet's orders of 21 and 26 May 2021 were unlawful. By judgment of 18 May 2022, the Tartu Halduskohus upheld the actions in part and found the Keskkonnaamet's order of 27 May 2021 to be unlawful.
- 10 By its appeal, the Keskkonnaamet sought to have the judgment of the Halduskohus set aside in so far as the actions had been upheld. By its appeal, Lemeks Põlva sought to have the judgment of the Halduskohus set aside in so far as the actions had been dismissed. By judgment of 23 March 2023, the Tartu Ringkonnakohus (Court of Appeal, Tartu) dismissed the appeal lodged by Lemeks Põlva, upheld the appeal lodged by the Keskkonnaamet and set aside the judgment of the Halduskohus in so far as the action had been upheld.

**The essential arguments of the parties in the main proceedings**

- 11 By its appeal on a point of law, Voore Mets seeks to have the judgment of the Ringkonnakohus set aside, the action upheld and the respondent ordered to pay it compensation in the amount of EUR 2 403.52 or, in the alternative, an amount fixed by the court.
- 12 It submits that the forestry declaration confers the right to fell timber within a period of 12 months but the order to suspend felling infringed that right. It claims to have carried out the felling in the knowledge that doing so would not cause disproportionate harm to birds. Previous practice, it submits, has given rise to the legitimate expectation that felling during the breeding season would not be regarded as deliberate disturbance or destruction of nests.
- 13 It argues that the purpose of Paragraph 55(6<sup>1</sup>) of the LKS is not to establish a general and comprehensive prohibition against felling during the entire breeding season of birds. In order for Paragraph 7(1)(3) of the LoKS to apply, it submits, an objectively demonstrable danger would have to be identified. Voore Mets posits that there being at least one pair of birds per hectare was not a real and immediate danger. It argues that the Habitats and Birds Directives have different levels of protection: the Habitats Directive protects habitats and species which are at risk, whereas the Birds Directive protects all birds. Voore Mets submits that the Court of Justice of the European Union has not yet interpreted [the concept of] ‘deliberateness’ within the meaning of the Birds Directive.
- 14 It argues that the order was disproportionate because the felling affects only 0.2% of broods. It cites the owner’s obligation to reforest the woodland within 5 years. As a result of that obligation, it argues, the birds always have suitable forest available for nesting if forest has been felled in their old nesting site in the previous year. It submits that the Keskkonnaamet did not take account of economic and social aspects (Article 2 of the Birds Directive).
- 15 In its appeal on a point of law, Lemeks Põlva seeks to have the judgment of the Tartu Ringkonnakohus set aside in its entirety, the judgment of the Tartu Halduskohus set aside in part and the actions upheld in their entirety or the case referred back to the Ringkonnakohus for re-examination.
- 16 It submits that prohibiting felling for the sole reason that birds might be disturbed during the breeding season is not proportionate and is not in line with the objective of the Birds Directive. The Birds and Habitats Directives, it argues, have different objectives and levels of protection. It posits that the suspension of felling can only be ordered after broods of birds have been found. Lemeks Põlva submits that the respondent had found no broods of birds at all on the plot of land prior to the order of 21 May 2021.
- 17 It argues that the Keskkonnaamet was regulating the prevention of disturbance of birds more strictly than or as strictly as for bird species in protection category I. The bird species identified, it submits, are neither particularly susceptible to

disturbance nor protected. Lemeks Põlva argues that the certain or probable identification of a bird's nest does not authorise the respondent to impose restrictions on any scale it chooses. It submits that felling in early summer has not been scientifically proven to be the main and essential cause of the decline in the population of certain bird species.

- 18 Voore Mets and Lemeks Põlva asked the Riigikohus (Supreme Court, Estonia) not to make a request to the Court of Justice for a preliminary ruling. In their view, the Opinion of the Advocate General in the *Skydda Skogen* case should be applied in the present case.

### **Succinct presentation of the reasoning in the request for a preliminary ruling**

- 19 The Administrative Chamber of the Riigikohus considers that resolving the present joined cases requires a request to be made for a preliminary ruling on the interpretation and review of the validity of the Birds Directive.
- 20 Voore Mets intended to carry out clear-cutting in accordance with forestry declarations, that is to say, felling in which, in principle, all the trees on the forest plot are felled in the course of the year, with the exception of seed trees and reserve trees necessary to ensure diversity of flora and fauna. Lemeks Põlva also intended to carry out mainly clear-cutting, as well as shelterwood cutting in one zone. Shelterwood cutting is carried out to raise the value of the forest, regulate its density and composition, and enable the wood of trees which will fall in the near future to be used. Only some of the trees are felled, in a proportion corresponding to the quantity set by ordinance by the competent minister.
- 21 Under Paragraph 7(1)(3) of the LoKS, the law enforcement authority has the right to halt forestry work for the reproduction period of wild animals. Under Paragraph 7(1)(3) of the LoKS, the suspension of felling operations can be ordered, inter alia, to uphold the prohibitions provided for in Paragraph 55(6<sup>1</sup>) of the LKS, if the specific danger arises that the prohibitions will be violated. Under Paragraph 55(6<sup>1</sup>)(1) of the LKS, deliberately destroying or damaging nests and eggs and removing nests are prohibited; under point (2) of the same subparagraph, deliberately disturbing birds is prohibited in particular during the breeding and rearing season. Paragraph 55(3)(4) and Paragraph 55(6<sup>1</sup>) of the LKS permit the killing of individuals of species in protection categories II or III, including birds, as well as the disturbance of birds and, as an exception, damage to nests and eggs if that is necessary to avert damage to important agricultural crops, livestock, fish farms or other important assets.
- 22 Paragraph 7(1)(3) of the LoKS and Paragraph 55(6<sup>1</sup>) of the LKS incorporate, inter alia, Article 5(a), (b) and (d) of the Birds Directive. The dispute between the parties before the Riigikohus primarily concerns what circumstances must be identified for clear-cutting and shelterwood cutting to be covered by the prohibition laid down in Paragraph 55(6<sup>1</sup>) of the LKS and the actions specified in that provision to be regarded as deliberate. There is also dispute as to what

evidence has to be provided of the birds nesting in the forest to be felled, how the danger to the birds and their nests and eggs is to be assessed and on what geographical and temporal scale restrictions are necessary to avert that danger.

- 23 The Court of Justice has already ruled in respect of the Birds Directive that
- the prohibitions provided for in Article 5 cover all wild bird species within the geographical scope of the Directive (*Skydda Skogen*, paragraph 33 et seq.);
  - the criteria on the basis of which the Member States can make exceptions to the prohibitions laid down by that directive must be set out in sufficiently clear and precise provisions of national law (Case C-192/11, *Commission v Poland*, paragraph 56);
  - all derogations from Article 5 made by the Member States must satisfy the conditions set out in Article 9, including the general condition that there must be no other satisfactory solution, as well as corresponding to the exceptions listed in Article 9(a) to (c) (C-432/21, paragraph 80 et seq.).
- 24 In respect of the Habitats Directive, the main aims of which include the protection of endangered species, including bird species, and their habitats (sixth recital), the European Court of Justice has ruled that
- the prohibitions listed in Article 12[(1)](a) to (c) can, in principle, apply to an activity, such as forestry work, the purpose of which is manifestly different from the capture or killing, disturbance of individuals of an animal species or the deliberate destruction or taking of eggs;
  - the implementation of the protection system laid down in those provisions is not subject to the condition that a given activity causes a risk of an adverse effect on the conservation status of the animal species concerned;
  - the condition as to ‘deliberateness’ is satisfied even if the author of the act only accepted the possibility of the consequences specified in the provisions (*Skydda Skogen*, paragraph 50 et seq.; C-221/04, *Commission v Spain*, paragraph 71).
- 25 Given that the present case does not concern species listed in Annex IV(a) to the Habitats Directive, it is in accordance with the Birds Directive that the dispute must be resolved. Notwithstanding those rulings by the Court of Justice, questions have arisen in the present case to which the Birds Directive and the case-law of the Court of Justice do not provide clear answers. Although the wording of the prohibitions in the two directives transposes Article 6 of the Convention on the Conservation of European Wildlife and Natural Habitats signed in Bern on 19 September 1979, the Riigikohus does not have sufficient certainty as to
- whether ‘deliberateness’ within the meaning of Article 5 of the Birds Directive is to be interpreted in the same way as in Article 12 of the Habitats Directive;

- if ‘deliberateness’ within the meaning of Article 5 of the Birds Directive includes accepting the possibility of killing or disturbing birds or destroying or damaging their nests or eggs, what circumstances are sufficient to conclude that such acceptance has occurred;
  - whether the phrase ‘to prevent serious damage to forests’ in the third indent of Article 9(1)(a) of the Birds Directive permits derogations from the prohibitions in Article 5 to prevent serious damage within the forestry sector and whether such damage may consist in the loss or excessive reduction of revenue from felling.
- 26 The lack of clarity on those questions in Articles 5 and 9 of the Birds Directive is indicated, inter alia, by the Opinion of the Advocate General in the *Skydda Skogen* case, which the Court did not expressly follow but which it also did not refute. The Advocate General indicates that the scope of the Birds Directive is broad, because it protects all wild birds including those which are not endangered. The purpose of the Birds Directive is not, she writes, to ensure strict protection – that is to say, protection of every individual. She points out that, under Article 2 of the Birds Directive, the population of bird species is to be maintained at a level, or adapted to a level, which corresponds in particular to ecological, scientific and cultural requirements, while taking account of economic and recreational requirements. At the same time, she finds, the conditions for derogations set out in Article 9 of the Birds Directive are formulated even more narrowly than in Article 12 of the Habitats Directive. Where the detriment to birds is not intended but only accepted as a possibility, the prohibitions under Article 5(a), (b) and (d) of the Birds Directive, for those reasons, in the view of the Advocate General, essentially apply only to the extent necessary to maintain the population of those species at a level which corresponds to the meaning of Article 2 (Opinion of the Advocate General, point 70 et seq.).
- 27 Other Member States have provided for various exceptions to the prohibition against detriment to birds for the forestry sector – Poland being one example (see C-432/21), Germany being another (see Gesetz über Naturschutz und Landschaftspflege, Law on nature conservation and landscape management, Paragraph 45(7)). The Court of Justice has not taken a position on whether it accepts the Commission’s argument that the statements in the *Skydda Skogen* case on deliberateness apply to Article 5(b) and (d) of the Birds Directive (C-432/21, paragraph 33).
- 28 In the view of the Riigikohus, there can be no reasonable doubt that clear-cutting which takes place during the breeding season of birds is more or less certain to cause the destruction of nests and eggs, the death of hatchlings and the disturbance of birds if there is reason to believe that birds are nesting in significant numbers on a forest plot. If a nesting tree is felled – unknowingly or knowingly – during clear-cutting, that inevitably leads to the destruction of the nest. Even if the nesting tree is preserved, the nesting birds are endangered not only by the disturbing noise but also by the loss of their previous habitat. In shelterwood

cutting, there is less danger of bird's nests being destroyed and juvenile birds dying, because only some of the trees are selectively removed from the forest.

- 29 Assessing the danger of detriment to birds is a prospective decision (see judgment of the Chamber No 3-17-1545/81, paragraphs 26 to 27), and that inevitably means that the probability of adverse consequences occurring has to be assessed. To implement the prohibitions set out in Paragraph 55(6<sup>1</sup>) of the LKS, read in conjunction with the provisions in Paragraph 7(1)(3) of the LoKS, there is no need for absolute or almost absolute certainty. It is sufficient that there be a concrete danger – that is to say, a situation in which, on the basis of an objective assessment of the established circumstances, it can be considered sufficiently probable that the object of legal protection will be harmed in the near future (see Paragraph 5 of the KeÜS and Paragraph 5(2) of the KorS). To establish the danger, it is not necessary separately to prove the situation of bird's nests by means of direct evidence. In accordance with the precautionary principle, conclusions may also be drawn indirectly in respect of broods, using general ornithological data and methods generally recognised in science. It is not unreasonable to conclude, on the basis of the type of forest and observation of some individuals, that broods are being reared during the breeding season of the birds, even if the forester did not notice birds at a given time during observation.
- 30 In the statements of reasons for the first short-term orders (of 17 and 21 May 2021), the Keskkonnaamet stated, on the basis of scientific data, that there was at least one pair of birds per hectare breeding in the forests of Estonia. Possible detriment to small numbers of birds which are not rare is an environmental risk which must be reduced by means of suitable preventive measures (Paragraphs 4 and 11(1) of the KeÜS). In the Chamber's preliminary assessment, one pair of birds per hectare does not exceed the threshold at which the person carrying out felling operations accepts the possibility of killing or disturbing birds or destroying or damaging their nests or eggs. If it becomes known in such a forest, before or during felling, that there is a nesting tree within the zone, under Paragraph 55(6<sup>1</sup>) of the LKS, that tree must not be felled. Felling the rest of the forest means, at worst, the destruction of the odd nest with eggs or juvenile birds which has gone unnoticed. It is not the aim of the Birds Directive to preserve every single bird and every single nest.
- 31 In the judicial proceedings, the Keskkonnaamet argued that, as a result of the type and age of the forest, the probable number of birds on the forest plot belonging to the appellants during the breeding season had been considerably higher than the minimum, at up to 8 to 10 pairs per hectare – that is to say, a total of 74 to 93 pairs on the plots at issue. That assumption, it submitted, was confirmed by the fact that, for example, probable bullfinch and nuthatch broods had been found in the Voore Mets felling area during the observation session of 21 May 2021. It submitted that the discovery of a pair of bullfinches and a nuthatch nest did not mean that there were no other birds nesting there. That was also indicated, it argued, by observation of birds on the same plot, though outside the felling area.

Certain or probable broods of several bird species were also discovered in the Lemeks Põlva forest.

- 32 In the initial assessment of the Chamber, where those additional circumstances are in place, the possibility is accepted that birds will be killed and their nests and eggs destroyed as a result of clear-cutting during the breeding season. The Chamber does not share the view of Voore Mets that the prohibitions laid down in Article 5 of the Birds Directive can be enforced only if the Member State has first established that the species concerned are in a satisfactory condition in the light of Article 2 of that directive. The Court of Justice has ruled (*Skydda Skogen*, paragraph 36) that the application of the prohibitions referred to in Article 5 of the Birds Directive is in no way restricted to the species which are listed in Annex I to that directive, or which are at some level at risk or are suffering a long-term decline in population. Nevertheless, there is some uncertainty as to whether a felling operation can be considered deliberate killing, disturbance, destruction or damage within the meaning of Article 5 of the Birds Directive if there is no reason to believe that endangered birds are nesting in the felling area and it is not the purpose of the activity to kill or disturb birds or to destroy or damage their nests. The fact that all bird species must be covered by the protection system does not necessarily mean that all birds must be protected in the same way. Article 5 of the Birds Directive must be interpreted in accordance with its purpose – that is to say, on the basis of Article 2. Only the Court of Justice can resolve that problem in a binding manner. The concept of ‘deliberateness’ within the meaning of Article 5 of the Birds Directive is autonomous. Its content is not determined by national law.
- 33 If the felling operations at issue are regarded as deliberately killing, disturbing or causing detriment to the birds or damaging or destroying their nests, it must be determined in the present case whether Article 9 of the Birds Directive permits derogation from the prohibitions laid down in Article 5(a), (b) and (d). In the view of the Chamber, there are significant arguments for considering that, in the present case, an exception under the third indent of Article 9(1)(a) can be considered which would permit derogation from the above-mentioned prohibitions for the purposes of preventing serious damage within the forestry sector and that such damage may consist in the loss of revenue from a felling operation.
- 34 If prohibitions against felling timber during the breeding season were to make it impossible for a long time to harvest timber either at all or in an economically viable manner, the situation could be one of serious damage to forests as an economic resource. To affirm the unlawfulness of the orders, the appellants argued, in essence, that they could incur such damage if it were not possible, for several successive years, to fell timber in the time the company required. In particular, they submitted, the value of the harvest-ready forest and the loss of revenue from its sale – including investments not yielding returns and the added economic value which results from shelterwood cutting – should be considered potential damage of that kind. Although the appellants are not claiming compensation for the value of the forest (Voore Mets is claiming compensation

only for the damage caused by the temporary suspension of the work), the possibility of such damage occurring is not irrelevant to the present case, as it illustrates the intensity of the interference in the appellants' fundamental right to property and freedom to conduct a business and, depending on the interpretation of the third indent of Article 9(1)(a), may justify a derogation and, in summary, highlight the unlawfulness of the orders issued by the respondent.

- 35 It can be assumed that the third indent of Article 9(1)(a) of the Birds Directive also refers to forest as an economic resource and the damage which occurs if it remains unutilised. That provision is based on the second indent of Article 9(1) of the Bern Convention, under which each Contracting Party to the convention may make exceptions from the prohibitions against causing detriment to species to prevent serious damage to 'forests, [...] and other forms of property' (German: '*Wäldern, ... und anderem Eigentum*'; French: '*aux forêts, ...et aux autres formes de propriété*'). That rather indicates that damage to forest as property is also, in principle, considered as a reason for derogation in the directive. That approach also aligns with the endeavour, referred to in Article 2 of the directive, to balance the conflicting interests. The possibility of derogating for the protection of flora and fauna as natural assets is provided for in the fourth indent of Article 9(1)(a) of the Birds Directive.
- 36 In light of the foregoing, if the third indent of Article 9(1)(a) of the Birds Directive is invoked, the foreseeable damage to the forester which justifies a derogation must be all the more severe the more endangered the bird species at issue, the higher the probability of the consequences for them and the greater the severity of those consequences. Under Article 9(1) of the Birds Directive, any derogation is subject to the condition that there be no other satisfactory solution. The satisfactory solution must not be purely theoretical. In view of the fact that economic requirements are mentioned in Article 2 of the Birds Directive, it can be assumed that the alternative solution must also be satisfactory in economic terms. Damage to forests as property must be borne by the forester if the felling operation must be prohibited to protect endangered bird species or the felling operation would jeopardise the aims of the directive for another reason. In contrast, if a felling operation does not jeopardise the aims of the directive, a derogation must rather be permitted if the alternatives do not make it possible to fell the forest in an economically viable manner.
- 37 On the one hand, the appellants in the joined case have put forward no convincing arguments asserting the absence of alternatives. Voore Mets does not claim that it is not technically possible to fell timber on the plot at issue at a time other than the breeding season of the birds; it claims that it favours felling during the breeding season so that it can make optimum use of its means of production and its workforce. It has stated that, within the group to which it belongs, only 10 to 15% of annual felling operations take place in spring. On the other hand, since there is no probable danger in either of the two joined cases to bird species which are in an unfavourable condition or to the required population level of the birds found on

the plot, it cannot be maintained that such considerations manifestly cannot justify a derogation.

- 38 Without anticipating the position of the Court of Justice on fundamental questions of interpretation of the Birds Directive, the Chamber does not consider it possible to assess the specific circumstances with regard, *inter alia*, to whether the Halduskohus and the Ringkonnakohus have sufficiently investigated the facts, including the possible damage caused to the appellants in the event of their having, as an alternative solution, to fell timber on the plots at issue at another time.
- 39 The appellants assert, in essence, that if a felling operation does not jeopardise [the aim of] getting the bird populations into the requisite condition, the lack of an option to permit the derogation described above is unlikely to be proportionate to the pursuit of the aim of the directive, in respect of which the EU legislature itself considered it important to take account of economic requirements (Article 2). In the view of the Chamber, the lack of an option to derogate or excessively strict conditions for such derogation would also infringe, in terms of proportionality, on the fundamental right to property and freedom to conduct a business, which are enshrined in Articles 16 and 17 of the Charter. For that reason, the Riigikohus also considers it necessary to request a preliminary ruling on the compatibility of the Birds Directive with the Treaties and on its validity in so far as it precludes the possibility of permitting a derogation in order to prevent the damage caused by forest not being felled, if the answers to the above questions establish that such a restriction exists.
- 40 It must be noted, however, that neither Paragraph 55(3)(4) and Paragraph 55(6<sup>1</sup>) of the LKS nor any other Estonian legislative provisions specify the precise conditions under which derogations may be made from Paragraph 55(6<sup>1</sup>) of the LKS and from Article 5(a), (b) and (d), which are transposed in that provision, in order to avoid serious damage to forest – including loss of revenue from a felling operation (see C-432/21, paragraph 73). For the Riigikohus, however, the absence of such a provision in no way alters the need to obtain clarity on the interpretation and full validity of the directive. If it were to emerge from the preliminary ruling that the Member States have been left sufficient leeway to permit derogations for the forestry sector, the lack of provisions establishing more precise exceptions could prove unconstitutional or preclude the issuing of orders in the present case and in similar circumstances.
- 41 The Chamber agrees with the view of the courts that the valid forestry declaration and the fact that the declaration was not made subject to conditions do not preclude the issuing of orders to enforce the prohibitions arising from Paragraph 55(6<sup>1</sup>) of the LKS. A felling authorisation does not confer an unconditional right to fell forest. Paragraph 55(6<sup>1</sup>) of the LKS must be upheld even during the period of validity of a forestry declaration. The argument that this imposes an obligation on foresters to conduct ornithological research is misguided. The forester must prevent detriment to birds in so far as he or she can

reasonably be expected to foresee it. Even if the Keskkonnaamet erred in failing to make the felling authorisation subject to the conditions necessary to comply with Paragraph 55(6<sup>1</sup>) of the LKS (see judgment of the Chamber No 3-21-979/44, paragraph 26), that does not exempt the forester from having to comply with legal requirements.

- 42 The Keskkonnaamet has not infringed the appellants' legitimate expectations by changing its administrative practice. Administrative practice cannot give rise to an absolutely legitimate expectation that the administrative authority will act in a similar way in the future, in particular if it subsequently transpires that the practice was unlawful. In the present case, the change in the Keskkonnaamet's practice cannot be considered arbitrary. The main reason for it was the judgment of the Court of Justice in the *Skydda Skogen* case. Whether the positions set out in the judgment cited also extend to the Birds Directive and whether it follows from EU law that the change in practice was ultimately necessary can be clarified after the preliminary ruling procedure.